United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,926

240

JAMES A. MADISON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court

for the District of Columbia

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QUESTIONS PRESENTED

1. Where the only evidence linking a defendant to a crime is the testimony of eye witnesses, all of whom were originally led to identify defendant on the basis of photographs shown to them by the police under procedures conducive to suggestion and lacking in any safeguards of reliability, should the trial judge not instruct the jury to regard such evidence with caution?

2. Where the trial judge extensively interrogates the defendant's key witness, inquiring into her conversations with defendant's counsel and indicating disbelief in her testimony, and where the trial judge does not subject any of the Government's witnesses to similar hostile questioning, does it not prejudice the defendant's right to a fair trial?

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TABLE OF CASES CITED

MISCELLANEOUS CITATIONS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,926

JAMES A. MADISON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction on three counts for (1) theft of property of the United States, (2) robbery, and (3) assault with a dangerous weapon (22 D. C. Code, §§ 2901, 502).

After trial, on October 19 to 20, 1965, Judge Gasch presiding, the jury returned a verdict of guilty on all three counts. On December 3, 1965, judgment was rendered upon the said verdict and appellant was sentenced to impris-

onment for a period of 3 to 9 years on count 1; 5 to 15 years on count 2; and 3 to 9 years on count 3, the said sentences to run concurrently. On the same day, this appeal was noted and appellant's application to proceed in forma pauperis was granted by the trial judge. On February 10, 1966, this Court entered an order appointing the undersigned counsel to represent the appellant in this appeal.

Jurisdiction over this appeal is conferred by Title 28, § 1291 of the United States Code.

STATEMENT OF THE CASE

On May 4, 1965, at 3:15 p.m., two men held up and robbed the Rental Office of the Federal Housing Authority at 234 W St., N.W., Washington, D.C.

There were six persons in the office at the time, all of whom were rounded up by the robbers and ordered at gun point into the ladies room while the robbers removed approximately $1,109 from the office safe and fled.

At about 3:30 p.m., after the robbers had left, the police were notified. Several minutes later, two police detectives, Detectives Hilton and Lucas, arrived at the scene with a looseleaf binder containing pictures of suspects (T 153-155), on the basis of which the defendant was identified by the witnesses as one of the two men who had held up the office.

The following day, on May 5, 1965, this identification was confirmed by three of the witnesses, McLean, Davis and Dunston, from colored slides shown to them at the Police Department (T 49-50).

Thereafter, a warrant was issued for the defendant's arrest (T 225) and on May 6, 1965, he appeared at the office of the Robbery Squad in response to a telephone call from Detective Hilton and was arrested (T 227).

At the trial, the Government offered the testimony of the six persons who witnessed the robbery. Each identified the defendant in the courtroom as one of the two robbers. Four of the witnesses testified that the defendant was wearing a hat at the time of the robbery (Davis, T 71; Mays, & 92; Brown, T 112; Johnson, T 144). Two of the witnesses testified that his head and face were covered by a shredded stocking (Mays T 92) pulled down "all the way over his face" which distorted his face "so you couldn't make out exactly, you know, his exact looks" (Brown, T 109). Four of the witnesses testified that his face was uncovered (McLean, T 32; Davis, T 78; Dunston T 118; Johnson, T 145).

The defendant offered the testimony of United States Commissioner Sam Wertleb to the effect that on the morning of May 4, 1965, the defendant appeared before him in the United States Court House (T 187). Bernice Chandler, also called by the defendant, testified that she had seen the defendant at the Commissioner's office the morning of May 4,

1965 and that on the same afternoon, at 3:10 p.m., she boarded the No. 82 bus on G Street at Woodward & Lothrop's Department Store downtown and recognized the defendant sitting in the seat in front of her (T 191-192).

On rebuttal, Detective Hilton testified to a statement voluntarily made by the defendant immediately after his arrest on May 6, 1965 (T 225-230) to the effect that at 3 p.m. on May 4, 1965, he and his wife had just returned from downtown and that his sister-in-law had observed him coming into their home. The detective made a point of the fact that the defendant had not mentioned Bernice Chandler to him at the time of arrest (T 236), although he never explained why it was incumbent upon the defendant at that time to have mentioned someone who had seen him on a bus downtown.

The trial judge interrogated the defendant's principal witness, Bernice Chandler, inquiring into conversations between the witness and defendant's attorney (T 214) and indicating disbelief as to her testimony (T 211-216). The judge did not interrogate any of the Government's witnesses or inquire into their conversations with government counsel in preparation for their testimony.

STATEMENT OF POINTS

1. The trial court erred in failing to caution the jury as to the likelihood of error in eye-witness identification made from photographs exhibited by the police under conditions conducive to suggestion and lacking in necessary safeguards.

2. The trial court erroneously prejudiced the jury's consideration of appellant's defense by its hostile interrogation of defendant's principal witness and by not subjecting any of the Government's witnesses to similar interrogation from the Bench.

SUMMARY OF ARGUMENT

1. The six eye witnesses who identified the defendant at the trial and constituted the only evidence offered by the Government against him, had all been led to identify the defendant originally on the basis of photographs shown to them by the police under circumstances conducive to suggestion and lacking in safeguards of reliability. The court should have specifically instructed the jury to satisfy itself that the identification made by the witnesses in court was not improperly induced by the photographs shown them by the police.

2. The trial judge interrogated the defendant's principal witness and inquired into her conversations with defendant's counsel in a manner that "took on the aspect of advocacy" and aligned the judge on the side of the prosecution in the eyes of the jury. As a result of the judge's hostile treatment of the appellant's principal witness and his failure to interrogate any of the government's witnesses, the jury was led to accept the government testimony uncritically and to discredit the appellant's testimony.

ARGUMENT

I. THE COURT ERRED IN FAILING TO CAUTION THE JURY AS TO THE INFIRMITY OF IDENTIFICATION TESTIMONY INDUCED BY PHOTOGRAPHS SHOWN TO THE WITNESSES BY THE POLICE UNDER CONDITIONS CONDUCIVE TO IMPROPER SUGGESTION AND LACKING IN NECESSARY SAFEGUARDS OF RELIABILITY

The Government's whole case consisted of testimony by six witnesses to the crime who identified the defendant at the trial as one of the two robbers. Identification by so many eye witnesses would appear to be overwhelming proof of defendant's guilt and it was apparently so regarded by the jury. The record below, however, shows that every one of the witnesses who identified the defendant at the trial had originally been led to identify him by means of photographs shown them by the police. The Government did not offer the testimony of a single witness whose identification of the defendant had not been preconditioned by photographic suggestion. And the Government did not offer any circumstantial evidence to corroborate this identification or to otherwise link this defendant to this crime.

Recent studies have shown that mistaken identification by eye witnesses constitutes the principal source of wrongful convictions[1/]; and the fact that several witnesses

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1/ Borchard, Convicting The Innocent; Frank, Not Guilty, p. 61 (1957); Houts, From Evidence to Proof, p. 10 (1956); Glanville Williams, The Proof of Guilt, 110-113 (1963); Wall, Eye-Witness Identification in Criminal Cases, 5-25 (1965).

identify a suspect provides no assurance that they are correct when all have been subjected to the same suggestive identification procedure.[2/]

It should be stated at the outset that the use of photographs to identify the culprit in this case would appear to have been unavoidable, and defendant does not question the use of that investigative technique per se. But the record below does suggest (a) that the photographic technique was used to excess in this case and (b) that adequate safeguards against suggestion by the police were not provided.

A. Photographic techniques for identification were used in excess.

Wigmore has observed that the mere fact that witnesses identify an accused in the courtroom is of little testimonial value in itself.[3/] What is of crucial importance is the witnesses's original identification of the defendant, which usually takes place in a police station "far removed from the courtroom and from those rules of evidence and procedure which seek to protect the witness against suggestive influences".[4/]

2/ Wall, supra, at 11, citing Williams, supra, at 120.

3/ 4 Wigmore, Evidence § 1130, 208 (3d ed. 1940); Wigmore, 25 Ill. L. Rev. 550, 551.

4/ Wall, supra, at 27. Cf. U.S. ex rel Stovall v. Denno, 355 F. 2d 731, at 738 (2nd Cir. 1966).

Where the original identification at the police station was made from photographs, there is always the danger that the subsequent corporeal identification may be based, not upon the witness's recollection of the features of the guilty party, but upon the recollection of the photographs.[5/] The corporeal identification is always closer in time to the photographic identification than it is to the crime and the witness generally studies the photographs far more carefully than he was able to study the features of the criminal. A fair and reliable identification procedure would therefore require that "where there is more than one eye-witness who will be called upon to attempt an identification, ... only one of the witnesses should be asked to view the photographs. If an identification is made, the person whose photograph is picked out may be arrested on the strength of the identification, and placed in a line-up for the benefit of the other witnesses, who have seen no photographs. This is the usual procedure followed in England.[6/]"

Applying the above principles to this case, once the defendant's photograph was identified by one or two witnesses, the remaining witnesses should not have been shown his photograph before they were asked to identify him in

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5/ Wall, supra, at 68.

6/ Id. at 83, citing Williams, Identification Parades (1955) Crim. L. Rev. (Eng.) 530-531; cf. 30 Rocky Mountain Law Rev. 332, 341 (1948).

person. Regardless of whether or not the remaining witnesses agreed that the defendant's photograph resembled the culprit, the police would have had grounds for asking the defendant to appear at a line-up.[7/] The only effect of showing his photograph to the four other witnesses was to precondition their corporeal identification by examination of his picture.

In the case of three of the witnesses, the psychological conditioning was further compounded. For some reason, never explained at the trial, they were shown full-length color slides of the defendant at the police station the following day; so that by the time they were brought face to face with the defendant at the hearing before the United States Commissioner on May 25, 1966 (T 172), his image had been indelibly impressed on their minds.

B. The procedure used by the police was conducive to suggestion and lacking in the safeguards of reliable identification.

There is a wide variance in the testimony of the witnesses as to the number of pictures shown them by the police at the scene of the crime on May 4, 1965. Witness Davis testified that he was shown eight or ten pictures (T 74). Witness McLean estimated that there were about ten pictures

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7/ It should be noted that the defendant came down to the police station voluntarily when Detective Hilton telephoned him (T 225-227).

in "booklets" (T 46). Laura Mays thought she was shown about eight or ten photographs (T 94). Johnny M. Dunston estimated that there were about 25 to 30 pictures in the book (T 124).

In an effort to rebut any inference of unfairness or suggestiveness in the use of these photographs (T 164), the Government offered as its Exhibit 2 at the trial a group of photographs in a black binder which Detective Hilton testified was the book he showed the witnesses immediately after the robbery on May 4, 1965. This book contained about 50 photographs (T 171). The book offered at the trial, however, was not the same as the book or booklets shown to the witnesses on May 4, 1965. When counsel for the defendant observed at the Bench that some of the pictures bore dates subsequent to the date of the crime (T 162), Detective Hilton was instructed to remove any pictures added subsequent to that date (T 165) while the jury was excused. The detective thereupon removed from the binder the pictures added subsequent to the date of the offense and added pictures which he believed had been removed during the intervening period (T 166-168). No record was made, however, of the additions or deletions or of the sequence in which the pictures were shown to the witnesses or of any factors which might have caused defendant's photograph to stand out from the group. The binder was nevertheless offered and admitted in evidence as the

group of photographs that Detectives Hilton and Lucas showed to the witnesses on the afternoon of May 4, 1965 (T 168, 177).

There was no evidence as to how the pictures shown to the witnesses were selected, although it was conceded (out of hearing of the jury) that the book contained pictures of men who had all had previous connection with the police (T 163).

It was apparent, however, that the pictures shown to the witnesses were selected before the detectives had obtained an independent description of the robbers from the witnesses, the book having been produced about five or so minutes after the robbery was reported and before the witnesses had been interviewed (T 74, 122-123).[8/] Hence the pictures shown to the witnesses could not have borne any rational relationship to the description of the culprit that the witnesses gave. It may well have been that the defendant's picture was the only picture remotely resembling the culprit in the eight or ten or twelve photographs that witnesses were shown.

At the trial, the culprit was described as a negro male, about six feet tall (T 120). The jury could not have known from an examination of Exhibit 2 how many other males of this approximate height, if any, were in the group of

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8/ Government witness John D. Davis, Management Clerk of the Rental Office, testified that he had been told that the police were on their way to the office to "show us some pictures in an attempt to identify the man who had robbed us before, prior to this last robbery" (T 74).

photographs shown to the witnesses on the afternoon of the crime. Even if the pictures shown to the witnesses were the same as those in the book offered in evidence as Exhibit 2 (which now appears most unlikely, infra fn. 9), they were admittedly not in the sequence in which they were shown to the witnesses (T 169). This Court cannot even know how many negro males of this approximate height were in the first ten photographs in the book shown to the jury, since further additions, deletions and changes have been made in the exhibit since the date of trial and no record was kept of the pictures that were contained in the book admitted in evidence as Exhibit 2 at the trial, or the order in which they appeared therein.[9/]

9/ In his affidavit of April 7, 1966, filed in this Court with the Supplemental Record of April 11, 1966, Detective Hilton now states that the book received in evidence as Government's Exhibit 2 was returned to him after the trial and was "disassembled from its original composition and used in further investigations". The detective goes on to say that he has now "reassembled this book to the best of [his] recollection" and that "the photographs presently in the book are some of those which I recall were in the book at the time of trial". He admits, however, that "it has been impossible for me to reconstruct this book in exactly the way it appeared at the trial."

If it was impossible for the detective in April 1966 to reconstruct the book exactly the way it appeared at on October 20, 1965, it was impossible for the detective at the time of trial to reconstruct the book exactly the way it was when it was shown to the witnesses on May 4, 1965. Yet this book was identified by the detective at the time of trial as the book containing the photographs he showed to the witnesses at 234 W St., N.W. on May 4, 1965 and offered by the Government to show the fairness of the procedure used by the police and the absence of suggestion by the police (T 164).

On the record preserved in this case, therefore, it is impossible to know to what extent each witness's selection of the defendant's photograph was conditioned by intentional or unintentional factors which made the defendant's photograph stand out from the group.[10/] That there was ample opportunity for such influence is clear from the procedure described by Mrs. McLean:

> "[Officer Hilton] just opened a book and he said: I have some pictures here. I am going to scan through the book. Would you see if you recognize one of the men in the robbery. And as he turned, I recognized Mr. Madison's picture."
>
> (T 46)

Officer Hilton also turned the pages for Mr. Dunston who, when asked how many pictures he looked at before he identified the defendant, replied:

> "Just a few pages. I can't recall the number of pages that he had turned. But I know it wasn't too long before he turned to this individual."
>
> (T 124)

Mr. Davis testified that the defendant's picture was among the first 4 or 5 shown him (T 76). Mr. Robertson saw defendant's picture after flipping through 5 or 6 pictures (T 157).

Aside from the opportunity for suggestion by Officer Hilton, himself, the procedure used by the police provided opportunity for suggestion by one witness to another. When

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10/ Cf. Wall, supra fn. 1, 81-83.

slides were shown at the police station, the record shows that all of the witnesses present viewed them together in the same room at the same time (T 50). The record is not altogether clear as to how the pictures were displayed at the scene of the crime and what effect the identification of the defendant by the first witness had on the second, third and fourth, etc. We do know that Mr. Dunston was present when Mrs. McLean was shown the photographs (T 45). And when Mr. Johnson was asked whether he was in a room by himself when he examined the photographs, he replied that he was at his desk; that "There were others around in there" but that he "didn't pay them any attention" (T 156). Whether the others paid any attention to what Mr. Robertson was doing, or whether Mr. Robertson observed what his fellow witnesses were doing when he was not examining the book himself, is not indicated. Human nature, however, suggests that robbery victims take a keen interest in the investigative activities of the police where they are given an opportunity to observe.

> "To permit witnesses to be together when examining photographs is to make it possible for an identification by one to influence or cause an identification by others. ... The practice is a dangerous one and should never be employed by the police. 11/

11/ Ibid, 83.

C. The jury should have been instructed as to the unreliability of the method used by the police to identify the defendant in this case.

Wall concludes his treatise on eye witness identification in criminal cases with the recommendation:

> "... that in every case where identification is an important issue, the trial judge should be required to warn the jury of the dangers of identification evidence in general and to instruct them to receive it with caution. Where the original identification was obtained in a suggestive manner, he should call this fact to the jury's attention, explaining its significance..... His failure to follow this rule in cases where it applies should result in the reversal of the conviction, unless the appellate court finds that the proof of guilt was so strong that the jury would have convicted the defendant even if the proper warning had been given." 12/

There was no question of the importance of the identification issue in this case. There was no other proof at all connecting this defendant with this crime. The trial judge should have instructed the jury that in determining the weight to be given to the Government's identification testimony they should have considered:

(1) that no witness identified the defendant in person who had not first been shown his photograph by the police;

12/ Ibid, 199.

(2) that the procedure surrounding the original photographic identification was conducive to suggestion and without safeguards as to reliability; and,

(3) that under such conditions, there was serious danger that the photographic identification was erroneous and that the corporeal identification at trial was based upon the witnesses's study of the defendant's photograph rather than their recollection of the culprit whom they briefly observed at the time of the crime.

II. THE TRIAL COURT PREJUDICED THE JURY AGAINST APPELLANT BY ITS HOSTILE INTERROGATION OF THE DEFENDANT'S PRINCIPAL WITNESS FROM THE BENCH AND BY NOT SUBJECTING ANY OF THE GOVERNMENT'S WITNESSES TO SIMILAR TREATMENT.

Instead of cautioning the jury as to the infirmities in the Government's eye witness identification testimony, the Judge improperly discredited the defendant's countervailing evidence by his interrogation of the defendant's alibi witness, Bernice Chandler. The Judge's interrogation of Miss Chandler consumed six pages of the trial transcript (T 211-216, inclusive) during which time the witness was cross-examined by the Court in detail as to her recollection of bus rides on the day before and the two days after the day of the crime as well as the bus ride on the afternoon of May 4, 1965, when she testified that she

observed the defendant. His examination also covered the witness's recollection of details of her movements prior and subsequent to her observation of the defendant on the afternoon of May 4, 1965.

The Government was represented at the trial by an able and experienced Assistant United States Attorney. Government counsel had effectively covered most of the same ground on his own cross-examination; he did not need any help from the trial Judge. The principal effect of the Judge's interrogation was to ally the Court with the United States Attorney and to convey to the jury that the Judge, like the United States Attorney, did not believe the witness's testimony. 13/

The prejudicial effect was further compounded by the Court's improper inquiry into conversations between the witness and defendant's attorney, suggesting to the jury that her testimony had been fabricated to meet the requirements this case (T 214). Miss Chandler was the only witness at the

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13/ It should be noted that Government's counsel did not overlook this alliance in his closing remarks to the jury:

> "Who is the second witness? Miss Chandler. And isn't she good? You would have to be the most naive person of the twentieth century to believe her. She has got a great memory for clocks. When she left the Commissioner she looked at the clock. When she got on the bus she looks at another clock. You heard His Honor question her about other days...."
> (T 250)

trial who was examined by the trial Judge in this intensive and antagonistic manner. None of the Government's witnesses were interrogated by the Court although the circumstances surrounding their initial identification of the defendant certainly indicated the need for further inquiry (See pp. 7-16 supra).

"What the judge did here took on the aspect of advocacy." Blunt v. U.S., 100 U.S. App. D.C. 266, 276-277; 244 F. 2d 355, 365 (1957). And as this Court said in Billeci v. U.S., 87 U.S. App. D.C. 274, 283; 184 F. 2d 394, 403:

> "The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution. The attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. 'Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.' (Citing United States v. Marzano, 2 Cir., 1945, 149 F. 2d 923, 926)."

If a trial judge has different ideas as to what lines of inquiry should be pursued, he is free to call both counsel to the bench and suggest what he wants done. But when the judge undertakes to interrogate witnesses at length, the risk is always present "of tilting the balance against the accused and casting the judge, in the eyes of some jurors, on the side of the prosecution". Jackson v. U.S., 117 U.S. App. D.C. 325; 329 F. 2d 893 (1964).

This is precisely what happened at the trial in this case. On this record, as on that in Jackson, it cannot be said with "that degree of assurance required in a criminal case," that the conduct of the trial judge "may not have prejudiced the defendant in the eyes of the jury" (id. at 894).

The harm was not cured in this case, any more than it was in Blunt, by the court's inclusion in its charge to the jury the standard instruction that it was the duty of the jury to find the facts and that they were not bound by his comments. Blunt v. U.S., supra, at 366.

CONCLUSION

As the result of the Judge's hostile interrogation of the Appellant's principal witness and his failure to interrogate any of the Government's witnesses or to caution the jury regarding the infirmity in the Government's eye-witness testimony, the jury was led to accept the Government's testimony uncritically and to discredit the defendant's testimony. Appellant, therefore, prays that the judgment of the court below be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,926

JAMES A. MADISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Cr. No. 688-65

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Did the trial court, in the absence of a request therefor, commit plain error by failing to instruct the jury that the Government's identification testimony should be received with caution, since the witnesses had also identified the appellant from photographs and colored slides shortly after the commission of the offenses charged?

2. Did the trial court, in questioning the appellants principal witness, prejudice the appellant's right to a fair trial?

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,926

JAMES A. MADISON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on three separate counts for theft of property of the United States,[1] robbery,[2] and assault with a dangerous weapon.[3] The case was tried to a jury resulting in a verdict of guilty on all counts. Appellant was subsequently sentenced to imprisonment for from three to nine years on the first two counts and from five to fifteen years on the robbery count, all sen-

[1] 18 U.S.C. § 641.

[2] 22 D.C. Code § 2901.

[3] 22 D.C. Code § 502.

tences to run concurrently. He was allowed to proceed on appeal without prepayment of costs.

The Government's witnesses testified that on the afternoon of May 4, 1965, at about 3:15 p.m., the appellant and another man entered the rental office of the National Capital Housing Authority at 234 W Street, N.W., Washington, D.C. At gunpoint, the robbers rounded up and herded five employees and a customer into a rest room in the rear of the building (Tr. 29, 58, 85, 107, 116, 139-140.) Moments later one of the men returned to the rest room and asked, "All right who has the money" (Tr. 58). When nobody replied, the man pointed at Mr. John D. Davis, the management clerk, and stated, "you know where the money is" (Tr. 29), and Mr. Davis was taken out of the rest room at gun point and brought back into his office (Tr. 29, 58, 85, 107, 116, 140). Then, still at gunpoint, the two men relieved Mr. Davis of the day's receipts, totaling about $690.00 of money belonging to the United States, which Mr. Davis had placed in his desk drawer (Tr. 58-60). Mr. Davis was then ushered back into the rest room (Tr. 58). The two men also took a bag of petty cash from the outer compartment of the safe and $17.00 from the cash drawer (Tr. 60-61). In all, $1,109.32 of monies of the United States were taken during the course of the holdup (Tr. 86, 99-100).

At trial, five of the persons who had been present in the office during the course of the holdup positively identified the appellant as one of the bandits (Tr. 31-32, 61-62, 110, 118, 142-43). The sixth, Mrs. Laura Mays, the office manager, could not make a positive identification but testified that the appellant "looks very much like the gentleman I saw" (Tr. 88). Two of the Government's witnesses had also identified appellant as one of the robbers at the office of the United States Commissioner on May 25, 1965 (Tr. 31, 118-19).

Explaning the circumstances under which they observed appellant during the robbery, the Government witnesses tesitfied to the following. Mrs. Venetta McLean testified that appellant was in her presence five minutes (Tr. 52),

that his face was exposed (Tr. 32, 53), and that he was two feet from her at the closest point (Tr. 32). Mr. Davis testified he was in the presence of appellant about a minute to a minute and a half before he was initially placed in the rest room, and a minute or two minutes when he was taken out of the rest room and brought into his office (Tr. 62). He also testified that appellant's face was exposed (Tr. 78) and that both men were about three or four feet away from him when they were in his office the second time (Tr. 59). Mrs. Mays testified that while she was sitting at her desk, appellant approached her and pointed a gun just a few inches from her head (Tr. 84-85, 86-87), but she thought that he had a shredded stocking over his face (Tr. 92). Mrs. Delores Brown, the customer present in the office at the time of the holdup, stated that she was about two yards from appellant when she saw him at the closest point (Tr. 108, 110), and that although he had a stocking over his face, she could see his face through holes in the stocking (Tr. 109-110). Mr. Johnnie M. Dunston, maintenance clerk at the office, testified that appellant pointed his gun at him from a distance of about two feet, that appellant's face was exposed, and that he had an opportunity to observe appellant's face (Tr. 118). Mr. Benjamin F. Johnson, the maintenance superintendent, testified that at the closest point he was four feet from the appellant, that he was able to look appellant right in his uncovered face (Tr. 142), and that there was no doubt in his mind that appellant was the man who pointed the gun at him (Tr. 160).

During extensive cross-examination, defense counsel brought out that five or ten minutes after the holdup, the police arrived and Detective Sergeant Glen Hilton showed the victims a loose leaf booklet containing several photographs. From this booklet, the witnesses identified appellant as one of the robbers (Tr. 45-47, 70-76, 94, 122-124, 153, 155-158.) Defense counsel further established that on the following day, May 5, 1965, Mrs. McLean, Mr. Davis, and Mr. Dunston were shown several colored

slides at police headquarters (Tr. 44, 49-50, 79-80, 124-126). Sergeant Glen Hilton testified that the witnesses had been shown a loose leaf binder containing about fifty photographs, immediately after the commission of the offense (Tr. 161-162, 169-171).

Appellant's defense was alibi, and he produced two witnesses to support this defense. The United States Commissioner, Sam Wertleb, testified that his records revealed that appellant had appeared before him on May 4, 1965. However, these did not reveal the time of appellant's appearance on that date. (Tr. 187.) Miss Bernice Chandler testified that she had seen appellant and his wife at the Commissioner's office on the morning of May 4, 1965, from 10:00 a.m. until she had left at 12:30 p.m. that same day (Tr. 189). She testified that she then went window shopping and at 3:10 p.m. boarded bus number eighty-two at Woodward & Lothrop's on the corner of F and G Streets (Tr. 190-91.). She testified that she recognized appellant and his wife sitting on the bus directly in front of her (Tr. 191) and that appellant departed from the bus at North Capitol and Florida Avenue (Tr. 192). On Cross-examination the prosecutor developed that Miss Chandler had never known or seen appellant or his wife before that morning in the Commissioner's office (Tr. 195, 197), that she did not talk to appellant or his wife nor did they talk to her at any time in the Commissioner's office (Tr. 197-198), and that she did not talk to appellant or his wife, nor did they acknowledge or talk to her at any time during the bus ride or thereafter (Tr. 200-201). Notwithstanding this and the fact that she had never spoken to appellant's wife or given the wife her name, she testified that appellant's wife called her about a week later (Tr. 203) and mentioned she had seen her at the Commissioner's on May 4, 1965 (Tr. 204). There was no explanation given by anyone as to how appellant's wife had learned Miss Chandler's name, address or phone number, although Miss Chandler did testify that her brother knew the appellant (Tr. 203). She then testified that appellant subsequently called her and asked her

if she remembered seeing him on the bus and if she would testify for him (Tr. 205).

Upon completion of redirect examination of Miss Chandler by defense counsel, the trial court examined the witness as to her recollection of times on dates prior and subsequent to the date of the commission of the offenses charged, and as to conversations with appellant's attorney (Tr. 211-216). Defense counsel recorded an objection to the inquiries of the court concerning Miss Chandler's conversations with counsel (Tr. 219).

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

I.

The failure of the trial court to give a cautionary instruction on the reliability of the identification testimony is not reversible error where appellant never requested any such instruction, expressed satisfaction with the in-

structions as given, was permitted to probe fully the reliability and credibility of the identification testimony, and argued such asserted unreliability to the jury during summation. Furthermore, plain error is lacking in this case since the trial court's full and comprehensive instruction adequately covered the subject and squarely framed the issue of identification in the minds of the jury. The detailed instruction that is now requested, in addition to those given by the Court is tantamount to asking the trial court to argue a factual issue for the accused.

II.

The court's examination of the appellant's alibi witness in the instant case was conducted in a judicial, dispassionate and impartial manner. At no time did the court assume the role of prosecutor or affirmatively convey to the jury an impression of disbelief in the witness's testimony or express an opinion of appellant's probable guilt. On the contrary, an examination of the record as a whole reveals that an atmosphere of fairness and impartiality toward appellant prevailed throughout the trial.

ARGUMENT

I. The trial court did not err in failing, *sua sponte*, to instruct the jury that it should receive the Government's identification testimony with caution.

(Tr. 32, 44-7, 49-50, 52-3, 59, 62, 70-76, 78, 84-85, 94-95, 108-110, 118, 122-26, 142, 153-58, 252, 265-68, 270-75.)

Although appellant did not request such an instruction at trial, he now complains that the trial judge erred in failing to instruct the jury specifically that it should weigh the identification testimony of the Government's witnesses with caution since the witnesses had initially identified appellant from photographs and colored slides shortly after the commission of the offenses charged.

The short answer to appellant's argument is that the absence of such a particularized charge on identity cannot

under any circumstances require reversal, where as here, the charge was not requested. *(Robert S.) Jones* v. *United States*, D.C. Cir. No. 19541, decided April 28, 1966; *Smith* v. *United States*, 119 U.S. App. D.C. 22, 336 F.2d 941 (1964); *(Charles M.) Jones* v. *United States*, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962), *cert. denied*, 372 U.S. 919 (1963); Fed. R. Crim. P. 30. Moreover, defense counsel extensively cross-examined the Government's witnesses as to the manner, means and accuracy of their identification of appellant, fully probing before the jury any possible influence the initial photographic identification may have had on their subsequent corporeal identification (Tr. 45-47, 70-76, 94, 122-24, 153, 155-58). Defense counsel also argued these facts to the jury during his closing argument (Tr. 252, 255). See *Smith* v. *United States*, *supra* at 22, 336 F.2d at 941. Not only did appellant fail to object to the charge as given, but on the contrary, expressed statisfaction (Tr. 275).[4] *(Robert S.) Jones* v. *United States*, *supra*; *cf. Kelly* v. *United States*, D.C. Cir. No. 19,746, decided March 8, 1966.

More fundamentally, the court's instructions in the instant case adequately covered the substance of the now requested instruction. The court gave a full and comprehensive charge on the presumption of innocence,[5] the Government's burden to prove the accused guilty beyond

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[4] Immediately upon conclusion of his instructions to the jury, the trial judge called counsel to the bench and the following colloquy took place:

> "THE COURT: Any comments?
> MR. ROBINSON: I don't recall hearing any burden of proof on the Government in that alibi instruction. I thought I was listening carefully.
> THE COURT: The burden of proof goes to all the elements in the case.
> MR. ROBINSON: The defense is satisfied." (Tr. 275.)

[5] The court instructed in part:

> "[T]he presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of *the defendant's guilt* from all the evidence adduced." (Tr. 265.) (Emphasis added.)

a reasonable doubt of every essential element of the offenses charged,[6] credibility and the extent to which the jury was to give weight to the witnesses' testimony, taking into consideration, among other things, their opportunity and ability to observe and relate the facts to which they had testified;[7] and the duty of the jury to acquit appellant, if, in view of all the evidence adduced at trial including appellant's alibi defense, the Government had failed to prove beyond a reasonable doubt that appellant was present at the time and place of the commission of the offense as charged.[8] Furthermore, the court repeatedly charged the jury that it must find beyond a reasonable doubt that appellant had committed each element of the offenses charged before he could be found guilty.[9] In view of these instructions and the arguments of

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[6] The court instructed in part:

> "Since the burden is always upon the prosecution to prove *the accused guilty beyond a reasonable doubt of every essential element of the crime charged*, a defendant has the right to reply upon the failure of the prosecution to prove its case." (Tr. 266) (Emphasis supplied.)

[7] Tr. 266-67.

[8] Tr. 267-68. The court instructed in part:

> "There has been testimony to the effect that *the defendant was not present at the time and place where this crime was committed*. The defense of alibi is legitimate, legal and proper defense. . . . If after a full and fair consideration of all the facts and circumstances in evidence you find *the Government has failed to prove beyond a reasonable doubt the defendant was present at the time and place of the commission of the offense as charged* in the indictment, it will be your duty to find *the defendant* not guilty." (Tr. 266-67). (Emphasis added.)

[9] Tr. 270-274. For example, on the charge of theft of Government property the court instructed the jury that the elements were: "(1) That *the defendant* stole or knowingly converted to his own use, ... (2) that *he* did so with an intent to steal, ..." (Tr. 270). (Emphasis added.) On the assault with a dangerous weapon count the court instructed the jury that the essential elements they must find were "(1) that *the defendant* assaulted Mr. Davis, that is . . . ; (2) that *the defendant* had an apparent present ability . . . ; (3) that *the defendant* made an offer or attempt with a dangerous weapon . . . ." (Tr. 273). (Emphasis added.)

counsel, the issue of identification was squarely framed for jury determination. A more particularized instruction, as is now requested, would be tantamount to asking the trial court to argue fact questions to the jury, see *Obery* v. *United States*, 95 U.S. App. D.C. 28, 29, 217 F.2d 860, 861 (1954), *cert. denied*, 349 U.S. 923 (1955), which the court is not obliged to do. *Lewis* v. *United States*, 295 Fed. 441, 447 (1st Cir. 1924). This Court has consistently held in cases raising the necessity for specific instructions on identity, that where, as here, the trial court has adequately instructed the jury on the presumption of innocence, the Government's burden of proving beyond a reasonable doubt every element of the offense, credibility, and the jury's duty to weigh all the evidence adduced, then the trial court's refusal or failure to give particularized instructions on identity is not plain error necessitating reversal.[10] *(Robert S.) Jones* v. *United States, supra; (Charles M.) Jones* v. *United States, supra; Obery* v. *United States, supra.*

The factors now urged on appeal were fully explored before the jury during extensive cross-examination by defense counsel in an unavailing effort to shake the positive

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[10] The instant case presents an identity instruction issue substantially similar to the requested instruction in this Court's recent decision in *(Robert S.) Jones* v. *United States, supra.* In *Jones,* the eye-witness Corbin, had been shown police photographs some six weeks after the commission of the offense, from which he had identified the defendant. The defendant requested an instruction that the showing of a photograph does not establish the identity of the person in the photograph. This Court held that the refusal of the trial court to give such an instruction, in view of the court's general instruction on identity, did not so prejudice the defendant so as to constitute reversible error. In the instant case, the court's instruction on identity, in view of the additional instruction of alibi, goes even further than the instruction in *Jones* toward informing the jury that they must acquit if the Government has failed to prove beyond a reasonable doubt that defendant was present at the time and place of the commission of the offense. Indeed, the trial court's instructions in the instant case seemingly satisfy the suggested form of identity instruction recommended by this Court in *Jones,* notwithstanding the fact that appellant never requested such an instruction. Slip Op. at 10.

identification of appellant as one of the robbers by five of the Government's witnesses (Tr. 44-47, 49-50, 72-76, 122-26, 153-58), and Mrs. Mays' testimony that appellant looked very much like one of the bandits (Tr. 94-95). As a result, appellant's argument loses sight of the evidence before the jury to the effect that this was a daylight robbery, the six identification witnesses were in close proximity with the robbers during the commission of the offenses charged (Tr. 32, 59, 84-85, 108, 118, 142), that the one identified as appellant was unmasked (Tr. 32, 53, 78, 118, 142), that the witnesses had a substantial opportunity to observe the perpetrators (Tr. 52, 62, 78, 84-85, 109-110, 118, 142), and that they made their initial photographic identification of appellant from a group of several photographs a mere five to ten minutes after the commission of the offense, while the events were still fresh in their minds (Tr. 45-46, 72-74, 93-94, 122-23, 153, 155-158). As such, this was not a case of doubtful identity, but, on the contrary, one where the opportunity for positive identification was good. Consequently, this testimony should not have to be received by the jury with caution. *United States* v. *Manos*, 223 F. Supp. 137, 141 (W.D. Pa. 1963), *aff'd*, 340 F.2d 534 (3d Cir. 1965). Moreover, the testimony identifying appellant as the criminal actor was credible and strong. See *Obery* v. *United States*, *supra* at 30, 217 F.2d at 862. Appellant is in effect now raising an issue of credibility, which was fully and properly before the jury. Matters of credibility are, of course, for the jury and not the courts.

II. The trial court's examination of appellant's witness was not improper.

(Tr. 188-210, 263-64)

Appellant also contends that the trial court prejudiced his right to a fair trial by examining his principal witness without submitting the Government's witnesses to similar treatment. It is well settled that a federal judge may "elicit the truth by an examination of the wit-

nesses." *Glasser* v. *United States*, 315 U.S. 60, 82 (1942); *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 63 (1960); *Griffin* v. *United States*, 83 U.S. App. D.C. 20, 164 F.2d 903 (1947), *cert. denied*, 333 U.S. 857 (1948). The trial court did no more in the instant case than was done in *Griffin*, that is, it examined the witness in order to test the accuracy of her memory, as an aid to the jury in its determination of the witness's reliability and credibility.[11]

There is no authority for the proposition that in exercising its prerogative to examine a defense witness, the court must also subject the Government's witnesses to similar treatment in order to guarantee an attitude of fairness and impartiality. On the contrary, the Court of Appeals for the Fourth Circuit has stated with respect to the duty of a federal trial judge to examine witnesses to assure that justice done and that the case is clearly understood by the jury:

> He should not hesitate to ask questions for the purpose of developing facts; and it is no ground of complaint that the facts so developed may hurt or help one side or the other. *Simon* v. *United States*, 123 F.2d 80, 83, *cert. denied*, 314 U.S. 694 (1941)

Accord, *Griffin* v. *United States*, *supra* at 22, 164 F.2d at 905; *United States* v. *Rosenberg*, 195 F.2d 583, 594 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

The court's examination of Miss Chandler, considering the record as a whole or otherwise, failed to result in the clear and plain showing of prejudice necessary to justify reversal. *Woodring* v. *United States*, 311 F.2d 417 (8th Cir. 1963); *Kowalsky* v. *United States*, 290 F.2d 161 (5th Cir.), *cert. denied*, 368 U.S. 875 (1961). The court's

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[11] The witness's veracity was open to serious doubt, as an examination of her seemingly implausible testimony readily reveals. (See Tr. 188-210). The witness's recollection of times on dates prior and subsequent to the alleged date of the offenses charged, and her conversations with counsel had not been covered by the government's cross-examination. See *Jackson* v. *United States*, 117 U.S. App D.C. 325, 329 F.2d 893 (1964).

examination was conducted in a cautious, dispassionate, judicial and impartial manner, free from any indication of hostility on the part of the court toward the witness. See *Spindler* v. *United States*, 336 F.2d 678, 682 (9th Cir. 1964), *cert. denied*, 380 U.S. 909 (1965). The court did not interrupt or take over the questioning of the witness, but waited until after completion of redirect examination by defense counsel. *Cf. United States* v. *DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961). Nor is there anything in the record that indicates that in his questioning of appellant's witness by comments, gestures, or otherwise, the judge conveyed an impression to the jury that he was prejudiced against appellant or that he disbelieved or belittled the alibi defense, or that he was of the opinion that appellant was guilty.[12] See *Hellman* v. *United States*, 339 F.2d 36 (5th Cir. 1964); *Cf. United States* v. *DeSisto*, *supra* at 835.

At no time during the presentation of testimony or during his charge to the jury did the trial judge express an opinion or comment on the evidence, although it was his prerogative to do so. *(Robert S.) Jones* v. *United States*, *supra; Quercia* v. *United States*, 289 U.S. 466, 469 (1933). Moreover, the judge's instructions to the jury in the instant case were a "model of studied impartiality." See *Woodring* v. *United States*, *supra* at 421. He carefully directed the jury's attention to the contentions of both parties without emphasizing one over the other and without in any manner indicating an opinion as to such contentions or the witnesses offered in support thereof (Tr. 263-275). *Id.* at 421.

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[12] In the instant case the court did not add to, distort, or supplement the evidence on its own, as was done in *Blunt* v. *United States*, 100 U.S. App. D.C. 266, 276, 244 F.2d 355, 365 (1957). Nor does the record reveal or appellant claim that the court engaged in any intonations or gestures to urge upon the jury the court's opinion of the guilt of the accused or to disparge his defense, as in *Billeci* v. *United States*, 87 U.S. App. D.C. 274, 281, 184 F.2d 394, 401 (1950). Nor is there present in the instant case the danger of "cummulative impact" due to an inordinate and repetitive number of instances of trial court examination and comment, as was the situation in *Jackson* v. *United States*, *supra* at 326, 329 F.2d at 894.

Although each instance of trial court questioning on review presents its own problems, the overriding consideration should be whether in the end the judge saw to it that the jury had before it all and only the admissible evidence produced, "and that it was given to understand that it was free to find the facts as in its collective judgment the evidence showed them to be." *United States* v. *Aaron*, 190 F.2d 144, 146 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951). See also *Billeci* v. *United States*, *supra* at 283, 184 F.2d at 403. In the instant case, the trial court clearly and extensively, at the beginning of its instructions, charged that it was the sole responsibility of the jury to determine the facts solely on the evidence produced from the witness stand and to disregard any comments of counsel and the court as the jury had the sole power of determining the facts (Tr. 263-264). Additionally, at the outset, the court emphatically instructed the jury as follows:

> If you think I have any view as to the guilt or innocence of the Defendant, you will disregard it and put it entirely out of your mind. As to the facts, you are the sole judges. (Tr. 264).

Consequently, in view of such instructions and the lack of comment on the evidence by the court, the sole responsibility for determining the facts was expressly and effectively given to the jury. See *Billeci* v. *United States*, *supra* at 283, 184 F.2d at 403.

Accordingly, a review of the record as a whole negates the conclusion that the court's examination of appellant's witness so exceeded the bounds of judicial propriety as to prejudice the appellant's right to a fair trial. On the contrary, the record reveals that the jury reached its verdict not on the basis of any influence from the court, but on the basis of the clear and convincing evidence of guilt produced by the Government.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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